Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

RONALD WARRUM, in his capacity
As Personal Representative of the Estate of
JOSEPH SAYYAH, Deceased
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 1402(b), 2401, 2402, 2412, 2671-2680.). Where a claimant has timely filed a tort claims notice alleging medical malpractice and subsequently dies, the Estate or personal representative of the deceased claimant must file an additional tort claims notice in order to maintain a cause of action for wrongful death.

PARTIES TO THE PROCEEDINGS

Petitioner is Ronald Warrum in his capacity as Personal Representative of the Estate of Joseph F. Sayyah, deceased.

Respondent is the United States of America, (hereinafter "Government").

CORPORATE DISCLOSURE STATEMENT

No party to the proceedings is a corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Warrum, in his capacity as Personal Representative for the Estate of Joseph Sayyah (hereinafter "Sayyah"), deceased, by counsel Robert R. Faulkner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Warrum v. United States of America*, 427 F.3d 1048 (7th Cir. 2005). It is reproduced in the Appendix at

App. 2. The order of the United States Court of Appeals denying rehearing is reproduced in the Appendix at App. 20. The opinion of the District Court granting Respondent's Motion for Summary Judgment is unreported and is reproduced in the Appendix at App. 14.

JURISDICTION

The Court of Appeals judgment was entered on October 25, 2005. A timely Petition for Rehearing was filed and denied on February 14, 2006, (App. at 20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The statute principally involved in this matter is commonly known as the Federal Tort Claims Act found at 28 U.S.C. §§ 1346(b), 1402(b), 2401, 2402, 2412, 2671-2680. The relevant portions of the Federal Tort Claims Act as included in Article 28 of the United States Code are set forth below:

§1346(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§2401(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

§2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee

of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.
With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter

§2675 (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.
(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented

to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§2679. (a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive.

STATEMENT OF THE CASE

Petitioner seeks review of the ruling of the Seventh Circuit Court of Appeals which held that where a claimant has timely filed a tort claims notice based upon tortious conduct, the foreseeable results of which could be death, the claimant then dies allegedly from the tortious conduct, the estate or personal representative of the claimant must then begin the process over and file a new tort claims notice in order to prosecute a claim for wrongful death.

Joseph Sayyah was a Vietnam Veteran being treated at the VA clinic in Evansville Indiana. As alleged by Sayyah's tort claims notice health care providers at the VA clinic failed to timely diagnose

cancer of the esophagus leading to a decreased chance of favorable treatment of Sayyah's cancer. Sayyah's cancer was discovered on March 9, 1999. Sayyah filed his tort claims notice on December 19, 2000. Mr. Sayyah died of cancer of the esophagus on February 4, 2002. Warrum in his capacity as personal representative of Mr. Sayyah's estate filed the complaint on May 22, 2002. On September 5, 2002 the Government filed its initial answer to Warrum's complaint. As Sayyah was a Vietnam War veteran being treated by the Department of Veterans Affairs the Government would necessarily have known when he died and knew at the latest on May 22, 2002 that Sayyah had died. Notwithstanding this knowledge the Government lay in wait until almost two years to the day from the date Sayyah died and filed a motion for leave to amend its answer to allege that no wrongful death tort claims notice had been filed. On September 22, 2004 the District Court granted the Government's motion to dismiss and alternative motion for summary judgment. On October 22, 2004 Warrum timely filed a Notice of Appeal. The Seventh Circuit decision was entered on October 25, 2005. Petitioner timely filed a petition for rehearing with suggestion for rehearing en banc on December 8, 2005 which was denied on February 14, 2006.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Seventh Circuit Below Creates a Split Among the Circuits and Contravenes Its Own Authority by Requiring a

Claimant to State the Cause of Action in Its Tort Claims Notice

The Seventh Circuit's decision is in direct conflict with the decision of at least one other circuit which does not require a second, additional tort claims notice for the same act or omission in order to prosecute a wrongful death cause of action where a timely tort claims notice has been filed with respect to the tortious conduct and the tort victim later dies of his injuries. The Seventh Circuit predicated its ruling on analysis of when a "cause of action" for wrongful death accrues which is largely irrelevant because a "claim" under the FTCA is not the same thing as a "cause of action". The Seventh Circuit unnecessarily concerned itself with the issue of when a "cause of action" for wrongful death accrues by implicitly holding that a "claim" for purposes of the FTCA is the same as a "cause of action".

The Seventh Circuit on page four (4) of its opinion says "Although Sayyah filed a medical malpractice administrative claim notice after his cancer was diagnosed, an administrative claim for wrongful death was never presented to the agency." The underlying premise of that statement is the proposition a claimant has a duty to state his or her cause of action in the tort claims notice. This holding is contrary to the Seventh Circuit's own authorities which hold that the claimant need not specify a legal theory in order to have his or her claim be deemed sufficient. *Palay v. United States* 349 N.E.2d 418, 425 (7th Cir. 2003)(citing *Murrey v. United States*, 73 F.3d 1448,

1452 (7th Cir. 1996). The Seventh Circuit has created a split among the circuits by contravening authorities of other circuits which also hold that the claimant need not specify a legal theory to have his or claim be deemed sufficient. *Santiago-Ramirez v. Secretary of the Department of Defense*, 984 F.2d 16, 19-20 (1st Cir. 1993), *Broudy v. United States*, 722 F.2d 566, 568-569 (9th Cir. 1983), *Brown v. United States*, 838 F.2d 1157, 1160 (11th Cir. 1988). A form 95 is entitled to a generous construction. *Palay*, 349 F.3d at 425. Any cause of action fairly implicit in the facts listed in the form 95 will be considered a claim that was "presented" for purposes of the exhaustion requirement. *Id.* at 426. If the claim would have been apparent to a "legally sophisticated reader" of the form the agency will be charged with notice of the claim and deem it to have been exhausted. *Id.* A skeletal claim form containing only the bare elements of notice of accident and injury and a sum certain for damages is sufficient. *Goodman v. United States*, 298 F.3d 1048, 1055 (9th Cir. 2003). If a claim meets this requirement it is sufficient even if a separate basis of liability arising out of the same incident is pled in federal court. *Id.* A claimant must give an administrative agency only enough information to allow the agency to begin its own investigation. *Burchfield v. United States*, 168 F.3d 1252, 1255 (11th Cir. 1999). The claimant is not required to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery or every factual detail that might be relevant. *Id.* The agency is deemed to be on notice not only of the theories of recovery stated in the claim, but of those theories that its reasonable investigation of the

allegations of the claim should reveal. *Id.* at 1255-1256. An administrative claim can put the agency on notice of theories not stated in the claim. *Id.* at 1256. All that is required is that the theory put forward in the complaint be based on facts stated in the claim. *Id.* The 7th Circuit's opinion is in conflict with at least three other circuits on this issue.

The *Burchfield* case is also significant to this case, as there, the VA was charged with knowledge of information contained in its own files. *Id.* at 1257. Similarly, most if not all the relevant information as to Sayyah's claim was contained in the VA's own files.

The Eleventh circuit has addressed an almost identical circumstance as that presented here, recognized the practicalities involved and correctly applied the foregoing principles. Where an individual tort victim has filed a timely tort claims notice and subsequently dies, the purposes of the tort claims notice requirement do not require the decedent's estate to file a second tort claims notice based upon the same occurrence after the claimant dies. *Brown v. United States*, 838 F.2d 1157, 1160 (11th Cir. 1988). There, the government took the exact same position under almost identical circumstances. The government alleged that the estate could not maintain a wrongful death action based upon the fact that the decedent's tort claim notice did not mention "wrongful death", *Id* at 1159. The court there began its analysis pointing out the well settled principle that the notice requirement does not require a claimant to enumerate

each theory of liability in the claim, *Id* at 1160. The Court then went on to state:

> "Compelling a claimant to advance all possible causes of action and legal theories is "overly technical" and may frustrate the purpose of section 2675(a) notice requirement. *Mellor v. United States*, 484 F.Supp. 641, 642 (D.Utah 1978). A "claim" is not synonymous with a "legal cause of action." *Nelson v. United States*, 541 F.Supp. 816, 818 (M.D.N.C. 1982); *Mellor*, 484 F.Supp at 642. IN this case, the claim filed by Charlie Brown provided the VA with the facts necessary to conduct a full investigation of the underlying circumstances. Requiring the appellee to exhaust the administrative claim procedure again would serve no useful purpose [fn omitted]. It is unlikely that the agency would conduct a second investigation or otherwise act any differently.
>
> The United States also maintains that until the new claimant files an administrative claim the district court lacks subject matter jurisdiction because a "new, independent cause of action arose when Charlie Brown died." The Florida Wrongful Death Act provides that a wrongful death action may be maintained on behalf of statutory beneficiaries if the decedent was entitled to bring an action based on the wrongful event. *See* Fla.Stat §§ 768.19-20 (1985). Although a Florida wrongful death

> action is clearly distinct from a personal injury action, liability of a defendant in a wrongful death action is based on the negligent or wrongful act which injures the decedent. See *Martin v. United Sec. Servs. Inc.*, 314 So.2d 765, 770 (Fla. 1975). *Gaboury v. Flagler Hosp., Inc.*, 316 So.2d 642, 644 (Fla.Dist.Ct.App. 1975). "The death is not the operative fact upon which liability rests." *Nelson*, 541 F.Supp at 818. A new administrative claim is unnecessary for a wrongful death action because while a different legal injury is suffered, both actions are based on the same injury in fact. [fn. omitted] *But see Raymond v. United States*, 445 F. Supp 740 (E.D.Mich. 1978)(wrongful death claim is separate and distinct from personal injury claim under Michigan law). Although a new cause of action accrued at the time of Brown's death, the United States' liability is based on the same facts presented in Brown's administrative claim. We therefore hold that the district court properly exercised subject matter jurisdiction in this case." *Brown* 838 F.2d at 1161.

I.C. 34-23-1-1, as does the Florida wrongful death act, provides that a wrongful death action may be maintained on behalf of statutory beneficiaries if the decedent was entitled to bring an action based on the wrongful event. As under the Florida wrongful death act, a wrongful death action is distinct from a personal injury action however liability of a defendant under a

wrongful death action is still based upon the negligent or wrongful act which injures the decedent. *Spoonamore v. Armstrong World Industries,* 105 F.Supp.2d 928, 938 (S.D.Ind. 1999), *Drake Insurance Company of New York v. Carroll County Sheriff's Department*, 427 N.E.2d. 1153, 1156 (Ind.Ct.App. 1981). One of the cases cited in *Brown* was very similar on its facts to the instant case. *Nelson v. United States*, 541 F.Supp. 816, 818 (M.D. N.C. 1982). The Seventh Circuit grievously erred by deciding the same issue diametrically opposite from the well reasoned analysis of the Eleventh Circuit in the *Brown* case. If the Seventh Circuit had recognized the practicalities involved and applied the principles the Eleventh Circuit did in *Brown* it would not have had to concern itself when a wrongful death **cause of action** accrued because Sayyah's **claim** put the government on notice of facts out of which a wrongful death cause of action could arise.

For the government, the district court and the Seventh Circuit to hold that Sayyah's claim did not put the VA on notice of a potential wrongful death claim is necessarily to adopt the implausible proposition that the VA, as a matter of law, is ignorant of the universally known fact that patients who suffer from undiagnosed or misdiagnosed cancer tend to die. Consequently, certiorari is warranted to reconcile this conflict among the circuits and to correct the Seventh Circuit's departure from the accepted and normal course of judicial proceedings.

B. The Seventh Circuit also Created a Split Among the Circuits by Incorrectly Analyzing Accrual of the Wrongful Death Cause of Action

As noted above, the Seventh Circuit did not need to address the issue of when a wrongful death cause of action accrues because the facts alleged in Sayyah's claim put the government on notice of a potential wrongful death cause of action. The Seventh Circuit's opinion contravenes authority of the Fourth Circuit in *Miller v. United* States, 932 F..2d 301, 303 (4th Cir. 1991). That case was decided under Virginia's wrongful death statute which differs from that of Indiana in that it does not create a new cause of action for wrongful death, *Id.* Nonetheless, the analysis is applicable here as, under Indiana's statute in a medical malpractice case, accrual of the cause of action and commencement of running of the statute of limitations is a function of the date of occurrence of the tortious conduct, not the date of the resulting death.

The Fourth Circuit held that a wrongful death cause of action under Virginia's wrongful death statute, for purposes of the FTCA, accrues and the statute of limitations begins to run on the date the claimant first knows of the existence of an injury and its cause, *Id.*. The operative principle the Fourth Circuit relied upon in so holding is stated as follows: "For this reason, a wrongful death action under Virginia law is necessarily time-barred if at the time of the decedent's death her personal injury claim based upon the tortious conduct that ultimately caused death is already time-barred [citation omitted]." *Id.* The

foregoing recitation of Virginia law is practically identical to the Indiana statute of limitations for a wrongful death based upon medical malpractice which begins to run on the date of the occurrence of malpractice rather than date of death. *Hopster v. Burgeson,* 750 N.E.2d 841, 853 (Ind.Ct.App. 2001). Consequently, the fact that Virginia's wrongful death statute creates a derivative rather than independent cause of action is not a meaningful distinction as the accrual/limitations analysis is identical under Virginia law to that of Indiana in that circumstance. The Sixth circuit subsequently reached the same result relying upon the analysis in *Miller. Chomic v. U.S.,* 377 F.3d 607, 614 (6th Cir. 2004).

Both *Miller* and *Chomic* were applying the principle that the FTCA waives sovereign immunity to the extent that state law would impose liability on a private individual under similar circumstances, *Id.* at 609, *Miller,* 932 F.2d at 303. Both cases concluded that since state law was such that a cause of action for wrongful death accrued when the existence and cause of the injury were known rather than the date of death, for purposes of the FTCA the wrongful death claim would accrue on the same date. In such an instance the government's liability and exposure to suit would be the same as that of a private actor.

Under the Seventh Circuit's opinion the liability of the United States is far broader than that of a private health care provider in Indiana. In Indiana, as a general rule, claims against private health care providers, even those resulting in death, are barred two

years from the date of the occurrence of the malpractice. The United States' exposure is virtually unlimited. Under this opinion, the United States can be liable for a wrongful death attributable to medical malpractice five, ten, twenty or even fifty years after the occurrence. On the other hand, under Indiana law Sayyah's or his personal representative's prosecution of whatever causes of action arose out of his claim would be preserved under Indiana law by his taking action within two years of occurrence of the malpractice, which is contrary to the result reached by the Seventh Circuit.

The Fifth Circuit has reached a somewhat different result than either the Seventh, Eleventh or Sixth. There, the Fifth Circuit was confronted with a circumstance where the tort claims notice was filed more than two years after the tortious conduct, but less than two years after the victim's death. *Johnston v. U.S.*, 85 F.3d 217, 218 (5th Cir. 1996). In Texas, a wrongful death action is derivative rather than independent. *Id.* at 222. The Fifth Circuit held that, irrespective of state law, the interests of uniformity warrants a rule that a wrongful death cause of action can never accrue prior to death, *Id. at 224.*

The *Johnston* case further illustrates the folly of the Seventh Circuit in deciding this case based upon accrual of the "cause of action" and how that folly creates nonuniformity and inequity. One of the purposes of the statutory claim requirement is to provide for more fair and equitable treatment of private individuals and claimants when they deal with the

Government. *Erxleben v. United States,* 668 F.2d 268, 273 (7th Cir. 1981), *Blair v. United States*, 304 F.3d 861, 866 (9th Cir. 2002). In *Johnston*, the Fifth Circuit was guided by equity. *Johnston*, 85 F.3d at 224. In doing so, the Fifth Circuit saved the plaintiff's claim from expiration of the statute of limitations. *Id.* at 218. By its holding in *Fisk* the Seventh Circuit similarly saved the plaintiff's claim from expiration of the statute of limitations. *Fisk v. United States*, 657 F.2d 167, 173 (7th Cir. 1981). The Seventh Circuit spoke of its applying a "less restrictive federal rule". *Id.* at 172. What the Seventh Circuit has actually formulated a **more restrictive** federal rule which applies to plaintiffs who file a tort claims notice within two years of the negligence where the victim later dies before the matter can be resolved. Even if the wrongful death "cause of action" accrued on the date of death, if the Seventh Circuit had followed *Brown* recognizing that a "claim" alleging failure to diagnose cancer should put the government on notice of a potential wrongful death "cause of action" it could have been equitable to both types of plaintiffs. Instead, under the rule applied by the Seventh Circuit Sayyah's family and the plaintiffs in *Nelson* and *Brown* would be precluded from maintaining a cause of action because their tort claims notices would have been premature for a wrongful death. The Sixth Circuit disapproved of the analysis of the Fifth Circuit *Johnston v. United States*, *Chomic*, 377 F.3d at 612.

Other circumstances presented by this matter have created grievous inequity. Not only did the Seventh Circuit hold that the estate of a veteran who'd

been the victim of malpractice must engage in what other courts have concluded is the superfluous formality of filing another, almost identical, tort claim notice based upon the same acts and omissions as the first. In this matter, the government was Sayyah's primary health care provider. By its own admission it knew from its own records that Sayyah had died. Relying on the notion that lack of subject matter jurisdiction is not subject to waiver, the government intentionally lay in wait and intentionally withheld raising this issue until two years after Sayyah's death had passed. It was these tactics that the government undertook and the District Court and the Seventh Circuit have sanctioned and rewarded. This result is an affront to any consideration of fairness and equity which the cases attribute to the tort claims act.

C. The 7th Circuit's Opinion Creates a Split Among the Circuits by Its Failure to Properly Apply the Federal Rules of Civil Procedure in Construing Warrum's Complaint

On page 9 of its opinion the Seventh Circuit rejects Warrum's argument that, whether or not a wrongful death cause of action may be maintained, the complaint in the alternative states a survival claim based on Indiana's increased of harm/loss of chance doctrine set forth in § 323 of the Restatement (2nd) of torts (1965) which has been adopted by Indiana. *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1388 (Ind. 1995), *Cahoon v. Cummings*, 734 N.E.2d 535, 543-544 (Ind. 2000). In *Cahoon* the following jury instruction was at issue:

> "If you determine that the Defendant's negligence was not a substantial factor in Mr. Cummings' death, but the Defendant's negligence increased the risk of harm to Mr. Cummings by reducing his opportunity for a better result, and that increased risk was a substantial factor in that harm, then you should award such damages as will fairly compensate the Plaintiff for the harm sustained. Harm may be the loss of opportunity for cure, decreased short-term survival, or unnecessary physical pain and mental suffering. [Joann] Cummings is also entitled to be compensated for her loss of consortium....", *Id* at 543-544.

The Indiana Supreme Court observed that the instruction, while unclear, was an accurate statement of Indiana law. *Id* at 544. While a plaintiff may not recover on a survival claim and a wrongful death claim, he is allowed under Indiana law to pursue both theories to verdict, *Id* at 543. The complaint in this matter states a cause of action both for wrongful death and under the survival statute.

Paragraph 17 of the complaint refers to the administrative claim which Sayyah filed with the VA. That claim alleges in relevant part:

> "Failure to timely diagnose cancer of the esophagus leading to a decreased chance of favorable treatment of the claimant's cancer.".

Further, the complaint filed herein alleges in paragraph 12 as follows:

> "As a result of a [sic] negligence, carelessness and medical malpractice of the defendant's employees, Sayyah's condition caused him to suffer pain, mental anguish, bodily injury and ultimately caused his death."

The jury instruction upheld in *Cahoon* specifically includes unnecessary physical pain and mental suffering as an element of damages for the increased risk of harm/survival claim which are almost identical to the allegations of paragraph of the complaint filed herein. In fact, under Indiana law damages for pain and suffering are only recoverable in a survival action and not a wrongful death action. *American International Adjustment Company v. Galvin*, 86 F.3d 1455, 1458 (7th Cir. 1996) (R'hrg and Suggestion for R'hrg.Den.).

Paragraph 17 of the complaint specifically refers to the tort claims notice Sayyah had filed with the VA which specifically alleges "a decreased chance of favorable treatment of the claimant's cancer". A decreased chance of favorable treatment is absolutely synonymous with the increased risk of harm to which the Indiana Supreme refers in *Mayhue* and *Cahoon* when addressing a survival claim.

In ignoring the survival claim, the Seventh Circuit contravened its own authorities and well settled authority of other circuits governing construction of

pleadings. Under the Federal Rules of Civil Procedure, complaints are to be construed liberally; accordingly, a plaintiff is not required to plead facts or evidence to support his claims, nor is he required to set forth explicitly his theory of the case. *Rimer v. Illinois Department of Transportation*, 148 F.3d 800, 804 (7th Cir. 1998). A complaint need not specify in detail the precise theory giving rise to recovery, all that is required is that defendant be on notice as to claim being asserted against him and grounds on which it rests. *Evans v. McClain of Georgia, Inc.* 131 F.3d 957, 964, n. 2 (11th Cir. 1997). *Fitzgerald v. Codex Corp.* 882 F.2d 586, 589 (1st Cir. 1989). Plaintiff need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim. *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.* 148 F.3d 1080, 1086 (C.A.D.C. 1998) A complainant is entitled to plead in the alternative, even if the pleadings are inconsistent. *Kruse v. Wells Fargo Home Mortgage Company Inc.*, 383 F.3d 49, 55, n.3 (2nd Cir. 2004), *Taylor v. Pathmark Stores Inc.*, 177 F.3d 180, 189 (3rd. Cir. 1999), *Fluorine on Call Ltd. v. Flurogas Limited*, 380 F.3d 849, 865, n.22 (5th Cir. 2004), *Ayers v. U.S.*, 277 F.3d 821, 829 (6th Cir. 2002), *Alper v. Altheimer and Gray*, 257 F3d 680, 687 (7th Cir. 2001). When a pleader is legitimately in doubt about the facts, he may assert contradictory statements of fact, *American International Adjustment Company v. Galvin.* 86 F.3d 1455, 1461 (7th Cir. 1996). Having specified the wrong done to him or her, a plaintiff may substitute one legal theory for another without altering the complaint. *Albiero v. City of Kankakee*, 122 F3d 417,

419 (7th Cir. 1997). Form of complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000). Under Federal Rules of Civil Procedure, a court may not rely solely on labels in a complaint, and must probe deeper and examine the substance of the complaint. *Minger v. Green,* 239 F.3d 793, 799 (6th Cir. 2001). The label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states. *Id.* It is not fatal to complaint that legal theory has been mischaracterized or that precise language invoking jurisdiction has not been used. *Torres Ramirez v. Bermudez Garcia*, 898 F. 2d 224, 226-227 (1st Cir. 1990). A complaint need not specify the correct legal theory or point to the right statute to be sufficient as a complaint merely describes the claim. *C&F Packing Company, Inc. v. IBP, Inc.* 224 F.3d 1296, 1306 (Fed.Cir. 2000). Consequently, the notion that the misdiagnosis causing Sayyah's death may be inconsistent with a survival action does not mean that the complaint cannot state a survival cause of action as well, the complaint does plead both causes as it is permitted to do under the Federal Rules of Civil Procedure. Consequently, even if the wrongful death claim was somehow barred, the District Court and 7th Circuit should have allowed Warrum to proceed on the survival action.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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